

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR.

:::

JUDGMENT

Lalit Kumar
vs.
Subhash Chandra

S.B.CIVIL SECOND APPEAL NO.2/2002
UNDER SECTION 100 CPC AGAINST THE
JUDGMENT AND DECREE DATED 29.10.2001
PASSED BY SHRI B.M. GUPTA, ADDITIONAL
DISTRICT JUDGE NO.2, BIKANER IN APPEAL
NO.116/1996.

DATE OF JUDGMENT :: 7.12.2005

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. RR Nagori, for the appellant.

Mr. Sajjan Singh, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

The plaintiff/respondent filed a suit for eviction of his tenant/appellant on the ground of personal bonafide necessity with the plea that he purchased the suit property from his father and presently, he is living in one room

accommodation in difficult situation. The trial court decreed the suit of the plaintiff on 20.8.1996 after recording finding that the plaintiff proved his personal bonafide necessity. The defendant/appellant preferred appeal against the judgment and decree dated 20.8.1996. Before the appellate court, an argument was raised by the tenant/appellant that just before the decision of the suit by the trial court, the plaintiff's father expired on 16.8.1996 thereby the plaintiff got his father's house in inheritance, therefore, the need of the plaintiff has come to an end if it was there. The said argument was considered by the first appellate court and the first appellate court after considering the said plea of the appellant, dismissed the appeal of the appellant/defendant vide judgment and decree dated 29.10.2001. Hence, this second appeal.

According to learned counsel for the appellant, the first appellate court committed serious error of law in ignoring subsequent events which had material bearing on the decision of the appeal as well as of the suit. It is also submitted that today also, the respondent cannot dispute about the date of death of his father.

Learned counsel for the appellant vehemently submitted that the first appellate court's judgment and decree are perverse merely because of the fact that the first appellate court dismissed the appeal after observing that the appellant did not prove the fact of death of the plaintiff's father Sardar Mal who died after final arguments on the suit and just a few days before the

pronouncement of the judgment of the trial court, therefore, the appellant could not have proved the fact in trial court and could have raised the plea in appeal only.

Learned counsel for the appellant also submits that the plaintiff failed to prove his need in any manner.

Learned counsel for the appellant also submitted that the facts brought on record by the appellant by moving application under Order 7 Rule 7 CPC and Order 6 Rule 17 CPC requires factual investigation if the facts stated in the application are not accepted as true. It is also submitted that in view of the subsequent event, the issue of comparative hardship has affected substantially in favour of the appellant. It is also pointed out by the learned counsel for the appellant that the court below failed to frame an issue about comparative hardship and that caused prejudice to the appellant's case.

In reply to the appellant's application Under Order 7 Rule 7 CPC and Order 6 Rule 17 CPC for amending the written statement and for taking on record the subsequent event, it was stated by the plaintiff that his father though died but before his death, he executed a will in the year 1993, copy of which is placed on record. The will is duly attested by Notary Public and it is clear from the will that the plaintiff's father since sold part of the property including the shop in dispute to the plaintiff, therefore, gave a small open plot to the plaintiff measuring 250 square feet (11 $\frac{3}{4}$ feet x 22 $\frac{1}{4}$ feet). It is also stated that the plaintiff was not the only heir but he has two more

brothers, one sister and mother. Therefore, in these circumstances, the plaintiff's need has not come to an end.

Learned counsel for the respondent submitted that the defendant got full opportunity to contest the suit and he led the evidence knowing it well that he is facing a suit for eviction. Therefore, in case any issue was not framed, such a question became irrelevant looking to the facts of the case because the plaintiff proved his need rather dire necessity.

I have considered the submissions of the learned counsel for the parties and perused the reasons given by the two courts below.

So far as the application under Order 7 Rule 7 CPC and Order 6 Rule 17 CPC is concerned, it is clear that the plaintiff's father, according to the defendant himself, died in the year 1996 before the suit was decided by the trial court despite this fact, till the first appellate court decided the appeal on 29.10.2001, no such application was submitted by the present appellant. The application has been filed before this Court in second appeal on 16.1.2002. In the application, the appellant only stated that the plaintiff's father died and the plaintiff got the house due to the death of his father. It is nowhere stated that the plaintiff is the only son or legal heir who got the entire house. Therefore, at the most by this application, the defendant's contention can be accepted only to the effect that the plaintiff got some share in the property.

To meet with this plea of the defendant, the plaintiff has rebutted the allegation by filing reply supported by an affidavit and also placed on record the copy of the will of his father duly attested by Notary Public on 2.9.1993. Therefore, the fact which has been alleged in the application has been controverted by support of affidavit and document. The facts of execution of will has not been controverted by the appellant by filing any counter affidavit. Therefore, it can be presumed that the plaintiff's father left behind total three sons including the plaintiff, one daughter and one wife. Even if the will is ignored, then they all are co-sharers in the property left by the deceased and if the will is accepted, then the plaintiff got an open piece of land. In either case, the need of the residential accommodation cannot be satisfied in the facts of the case. Therefore, the subsequent event is not very much relevant.

So far as the question of comparative hardship is concerned, that question was considered by the first appellate court. It was the case of the plaintiff that he is residing in one room and seeking possession of only one room which is in possession of the defendant, therefore, the plaintiff fully proved his need for additional accommodation. The fact speaks itself and it does not constitute substantial question of law in this case.

In view of the above, I do not find any merit in the application filed by the appellant under Order 7 Rule 7 and

Order 6 Rule 17 CPC as well as in the appeal. No substantial question of law is involved in this appeal, therefore, this appeal deserves to be dismissed, hence, dismissed.

At this stage, learned counsel for the appellant prayed that the appellant may be granted some time to vacate the suit premises because as he is a petty shopkeeper running his business since long in the suit premises and he will have to make alternate arrangement and that earning from the shop in question is the only source of livelihood, therefore, at least two years' time may be granted.

Learned counsel for the plaintiff/respondent vehemently submitted that the plaintiff is in dire need of accommodation because he is facing grave hardship and he has two sons also.

Looking to the facts of the case and looking to the peculiar fact that according to the appellant, he is doing cycle repairing work in the shop, it will be just and proper to permit the appellants to occupy the premises till 30.6.2007.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of two months that he shall hand over the vacant possession to the landlord by or before 1.7.2007, that he shall not sublet the suit shop or part with possession to anybody else except the landlord and shall pay all the arrears of rent and decreetal amount, if due,

within a period of two months from today either before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.7.2007. The appellant shall also deposit the rent month by month by 15th day of each succeeding month of his tenancy in the trial court or may deposit the rent in advance for the entire period. In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

(PRAKASH TATIA), J.

S.Phophaliya